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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

KENNY WILLIAM FOSTER,

Defendant and Appellant.

D042084

(Super. Ct. No. SCD167518 &
SCD168111)

APPEAL from a judgment of the Superior Court of San Diego County, David M. Gill, Judge. Affirmed.

A jury convicted Kenny William Foster of 15 counts of residential burglary (Pen. Code,¹ § 459) and 13 counts of theft from elder persons (§ 368, subd. (d)). The jury also found that each of the burglaries involved victims who were at least 65 years of age (§ 667.9, subd. (a)).

Foster was sentenced to a determinate term of seven years in prison.

Foster appeals challenging a single evidentiary ruling. As to that ruling, Foster claims the trial court abused its discretion. We will find no abuse of discretion and affirm.

FACTUAL SUMMARY

We will not include the traditional statement of facts in this opinion. Foster does not challenge the sufficiency of the evidence to support any of the counts and allegations in the information. He only challenges the court's application of Evidence Code section 352 to one statement attributed to him by certain of the victims. We will simply summarize the factual nature of the offenses in this case to provide context for the discussion which follows.

From sometime in 1998 through April 2002, Foster engaged in the process of selling home care insurance to seniors in San Diego County. National Home Care allegedly issued the policies. Supposedly the policies would provide the seniors with in-home care when needed.

When one family complained to the San Diego County Sheriff's Department that they could not contact Foster or obtain the necessary in-home care, the Sheriff obtained a search warrant for the home in which Foster lived. The warrant was served on a residence in Encinitas where Foster rented a room.

After the search warrant was served, Foster was arrested. He was advised of his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436. After waiving his rights he told detectives that the complainants were his clients and that they could get services

¹ All further statutory references are to the Penal Code unless otherwise specified.

under the policy if they asked for such services. He claimed he could have obtained subcontractors who would have provided in-home care. When pressed for names of providers he briefly mentioned one company then indicated he did not "want to drag anybody else into this."

Foster presented evidence that National Home Care was a legitimate business. Foster also presented testimony from the manager of Home Care Live-In Company. The testimony was that Foster had been a representative for that company at some point during the 1990's. In late 1998 Foster had referred some persons (not the victims in this case) to the company to assist in arranging care.

DISCUSSION

In September 2001, Foster sold a policy for in-home care to 80-year-old Ouida Wofford, Wofford's sister, and 79-year-old Dorothy Saltwell. Later that month, Wofford's sister was diagnosed with terminal lung cancer. Wofford asked her niece to contact Foster to arrange to cancel the policy. Foster said he would send a check. At the end of September Wofford had still not received the refund check. Her niece again contacted Foster who explained that his transactions had been delayed because his main office had been located in the World Trade Center and that the incident of September 11, 2001, had delayed all the transactions involving his office. Wofford never received a check.

Foster objected to any evidence about his statements regarding the destruction of the World Trade Center. He invoked Evidence Code section 352, claiming the prejudice of the mention of the incident would outweigh the probative value of the testimony. The

trial court carefully weighed the evidence and concluded that the probative value outweighed the prejudicial effect. The court said:

"Having thought about that, I -- again, I think that's where -- getting back to the point, I think it's fair for [the prosecutor] to argue to the jury that this was not just some coincidental happenstance that he happened to refer to the 9/11 [attacks] as an excuse. He could have thought of other reasons, I think. It was going to take at least a long while because the offices were in Florida or somewhere, and it took a while to communicate with them and all that business. So I think it can be argued on his design, specifically referring to the two outfits in the Twin Towers and they were destroyed. You may never -- plus, you can briefly argue that he was playing on the sympathy of these people: Well, gee, he's kind of small potatoes here, few hundred bucks, when the company was wiped out in [the] Twin Towers here. [¶] So I'm not going to pursue the matter. And I just -- this is a possible undue prejudice that was inherent in what I think was a conscious choice on his part to give that excuse. Of all excuses he could have given, to give that excuse. [¶] So under 352, that's a conscious weighing and balancing on my part. I think there is some substantial probative value. And I think just the inherent emotional content in -- and referring to 9/11 does not substantially outweigh that probative value in terms of undue prejudice. I'll allow you to testify to exactly what he said."

We review the trial court's decision to admit or reject evidence challenged under Evidence Code section 352 under the abuse of discretion standard. Under that standard we will not reverse a trial court's decision unless the record clearly demonstrates the trial court's exercise of discretion was absurd, arbitrary, capricious or amounted to a miscarriage of justice. (*People v. Rodriguez* (1994) 8 Cal.4th 1060, 1124-1125.)

The record before us demonstrates a careful, conscious weighing of the challenged evidence by an experienced trial judge. Plainly the court soundly exercised its discretion. It was Foster, after all, who attempted to stall his victim by conjuring up the story that his business was delayed by the loss of his office in the World Trade Center. The record

supports an inference he had no such office. In fact, Foster's company was apparently located in a rented bedroom in a residence in Encinitas, California. The significance of the statement made to the victim about the infamous "9/11" tragedy was that it was a lie to justify stalling the payment of a nonexistent policy. As the trial judge noted, it would not matter if Foster said his office in Florida was blown away in a hurricane. It was the lie to the victim that mattered; which tragedy Foster picked to cover his falsehoods was largely incidental. There was no significant risk that the jury would somehow become inflamed by the mere mention of the events of "9/11."

The trial court correctly balanced the interests of the prosecution in presenting the true nature of Foster's conduct as against any interest Foster had in avoiding undue prejudice. On this record, the trial judge's decision does not even come close to an abuse of discretion. It was the correct decision under the circumstances.

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

AARON, J.

IRION, J.